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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL JOHN HANAVAN,

Defendant and Appellant.

A146407

(Sonoma County
Super. Ct. No. SCR-663454)

INTRODUCTION

Defendant Samuel John Hanavan was convicted of elder abuse and aggravated assault, arising out of two separate incidents in which he first choked victim John Doe and later broke his jaw. He maintains the court erred in failing to instruct the jury on unconsciousness and involuntary intoxication and in admitting evidence of prior acts of misconduct. We affirm.

BACKGROUND

Defendant's convictions arose from two separate incidents in March 2015. Defendant, then 25 years old, had been staying with Doe at his senior apartment complex intermittently since sometime in 2014. Defendant's mother also lived in the complex, but defendant stayed with Doe because he did not get along with her and Doe had fewer rules. At some point, Doe gave defendant a key, but later asked for it back.

Early in 2014, Doe and defendant began a sexual relationship. After a number of sexual encounters, defendant stated he was not gay and did not want to continue. He did, however, continued to stay at Doe's apartment, consume his food, alcohol and cigarettes,

“tak[e] control” of Doe’s computer and television, and masturbate on his recliner chair or sofa.

Doe grew to resent “certain aspects” of defendant staying at his apartment, and felt used. Sometime in 2014, Doe wrote defendant a letter stating he was not happy with the situation, and would “ ‘really like to live alone again.’ ” Doe indicated defendant should move out, and gave him a deadline. Defendant did not leave for more than a few days. Doe testified he was “weak-willed. I like to think of it as kind and generous, but I’m a pushover.”

At some point, defendant became violent with Doe. In one incident in October 2014, defendant punched Doe three or four times in the jaw and eye. Doe took photographs of his injuries, a black eye and a “terribly swollen and bruised jaw.”

In another incident in early 2015, defendant slapped Doe eight to 10 times, in what began as a “playful” incident but continued after Doe told him to stop. Doe received a black eye, and recorded that incident on his calendar. Doe told other people he ran into a doorknob because he was embarrassed and did not want to admit he was in an abusive relationship.

On March 2, defendant choked Doe. Doe had been drinking cocktails, and was lying on his bed watching television and reading. Defendant came into his bedroom, “got [him] up off [his] bed and was standing behind [him].” Defendant put his arm around Doe’s neck and “squeeze[ed] to the point that it was cutting off [his] air and difficult to breathe.” After defendant choked him for “20 or 30 seconds with varying levels of intensity” Doe told him “ ‘Stop it. Get off me. You’re choking me. I can’t breathe.’ ” Defendant left the bedroom, and Doe went into his bathroom and locked the door. Doe called 911, and stayed in the bathroom until police arrived. He did not want to receive medical attention or press charges, but wanted a protective order.

Police located defendant, who was “very intoxicated,” 250 to 300 yards from Doe’s apartment. Defendant told police that Doe, who he described as “pretty fuckin’ gay,” drugged him and he “woke up one time [and] he was tryin’ to unbuckle my pants. I beat the fuck out of him.” In a second interview, defendant told police Doe was a

“creep,” but that he stayed at his apartment because he had nowhere else to go. He stated he was “uncomfortable with [Doe’s] presence on top of me,” so he “retaliated with putting him in check and letting him know you can’t do that or I’m going to beat the fuck out of you.” Doe told police he made no sexual advances that evening, but acknowledged he had “over a year ago.” Police asked defendant if he wanted Doe arrested for sexual battery or unwanted touching, but he declined.

On March 12, around 7:00 a.m., a paramedic responded to the alley next to Doe’s apartment, where he found Doe sitting on a concrete embankment. Doe “had a pretty obviously broken jaw,” with a “significant amount of swelling to both sides of his jaw and some blood coming from his mouth.” He was “having problems speaking . . . because his jaw was not connected to his mandible anymore.” Doe smelled of alcohol, and said he had been drinking.

The emergency room physician who treated Doe noted he had extensive injuries to his face. A CT (computerized tomography) scan showed he had a broken left cheekbone, a broken jawbone, and a fracture of the hyoid bone in his neck. Doe’s blood alcohol content was 0.187. The physician believed Doe’s injuries indicated he had been struck at least twice. Doe was hospitalized for two months.

Police questioned defendant, who appeared intoxicated, at the police station. Defendant said Doe was a “pretty cool guy other than maybe some weird shit.” He explained he had to stay with Doe because his mother “doesn’t want me to drink and go to her house.” He stated Doe made sexual advances to him, and that Doe drugged him. Defendant admitted “obviously it can’t be determined unless I was drug tested . . . [¶] . . . [¶] [T]he variation of the drug is always . . . a little different.” He explained Doe administered the incapacitation drug “through alcohol,” though he acknowledged, “obviously I can’t necessarily prove it.” Defendant told police about one incident in which he was incapacitated for 24 hours and Doe stuck “a dildo in my ass while I was incapacitated my first initial reaction was like oh yeah . . . you know feels good, hurry the fuck up. But it was nothin’ sexual. It was cause . . . [¶] . . . [¶] I wanted him to hurry the fuck up.”

At trial, defendant testified he believed Doe drugged him and raped him with a dildo 12 times, the first in May 2013. Defendant was suspicious of various drinks Doe gave him because they were either from an unsealed bottle or were drinks mixed by Doe. Defendant testified in the first incident he was “completely clean and sober” when he awoke from a nap but “whether I was drinking early that day, it’s hard to say.” He remembered having some drinks and falling asleep. When his “mental clarity” returned, he was standing with his pants around his ankles and Doe was attempting to insert a dildo in his anus. Defendant testified he “was unable to move or defend himself.” He told Doe it felt good even though it did not, then “felt hopeless . . . so [he] receded into unconsciousness.” Defendant testified this was repeated “a ridiculous amount of times, but the incidents changed.”

As to the March 2 incident, defendant testified he did not believe he was drugged. He put Doe in a headlock “to scare him” because Doe had tried to touch his penis. Defendant testified he “put [his] arm around him to scare him, but [he] did choke [Doe] for [a] very minimal amount of time, two or three seconds.” Defendant did not tell police about the claimed abuse because he did not feel comfortable telling them and he did not want Doe to “lose his place.”

According to defendant, on March 11, Doe invited him into his apartment because defendant told him his mother was not home and she had “forgotten to leave a key” for him. Doe left to go to work around 7:45 p.m., and defendant started drinking. Doe returned from work while defendant was still awake. Defendant remembered, “doing recordings” on his phone so he “would know for a fact he would not do this again.” He then fell asleep, and when he awoke Doe was penetrating him with a dildo. Later, he awoke to find Doe on his back, naked. Defendant did not have “an accurate depiction of what happened after that,” but had only “flash images.” He remembered hitting Doe. He did not remember how many times he hit him, but “it was enough to knock him . . . away.” Defendant told Doe he was lucky he did not kill him because defendant “knew [he] really messed up this time, and [he] was scared,” so he wanted to “make [Doe] think that [he] was justified in these actions.” Defendant “didn’t have an awareness of exactly

what was happening at that time as far as the whole situation exactly.” He took “some video recordings, trying to justify . . . what [he] did.” Doe’s “jaw was swollen . . . [and] could be consistent with [a] broken jaw at that point.” Defendant testified “I felt if I were to be detained and question[ed] about the scenario around me, because I remember it looking bad, . . . that I would be arrested for these charges. So I felt that time was not appropriate to deal with these charges, so at which point I hopped the back of the fence . . . and I had continued to sleep there until my alarm woke me up, and I was able to get to work, . . . deal with what had happened at a later time.”

Defendant testified he did not know what drug Doe used, but it caused him to be “semiconscious and unable to move.” He looked for the drug in Doe’s cabinet, but did not find it. Defendant could not explain what “amazing drug . . . can render someone awake, but they can’t move for 24 hours.” He “assume[d] it would have been liquid. [He] didn’t see any residue in cups or anything like that,” but Doe “could have kept it in his closet . . . [though defendant] never really looked there.”

Doe testified he had never drugged defendant and neither had any “date-rape” drugs nor knew where to obtain them. On one occasion when defendant suggested Doe had drugged him, Doe told him “ ‘I think you just had a lot to drink today.’ ”

Defendant acknowledged hitting Doe on a number of occasions, but testified “when I was drugged, I don’t have an accurate depiction of what happened.” He believed Doe’s reason for sexually assaulting him was “because then [defendant] would beat him up and then [Doe] would get sympathy for the resulting injuries.”

DISCUSSION

The Trial Court Had No Duty to Instruct on Unconsciousness and Involuntary Intoxication

Defendant asserts the trial court had a duty to instruct the jury regarding unconsciousness (CALCRIM No. 3425) and involuntary intoxication (CALCRIM No. 3427) because substantial evidence supported those instructions.

CALCRIM No. 3425 provides in part: “The defendant is not guilty . . . if (he/she) acted while unconscious. Someone is unconscious when he or she is not conscious of his

or her actions. [Someone may be unconscious even though able to move.]

[¶] Unconsciousness may be caused by (. . . involuntary intoxication).” CALCRIM No. 3427 defines involuntary intoxication: “A person is involuntarily intoxicated if he or she unknowingly ingested some intoxicating liquor, drug, or other substance, or if his or her intoxication is caused by the (. . . trickery of someone else), . . . [, without any fault on the part of the intoxicated person].” (Italics omitted.)

“Trial courts only have a sua sponte duty to instruct on ‘the general principles of law relevant to and governing the case.’ ” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333–334.) “[A] trial court’s duty to instruct, sua sponte, or on its own initiative, on particular defenses is more limited, arising ‘only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ ” (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

Defendant’s theory of the case, however, was self-defense. In closing argument, his attorney asserted “the central issue in the case is self-defense.” “In all of the charged offenses and all of the lesser offenses, self[-]defense is a defense. [¶] . . . [¶] You heard from [defendant] that in order to stop the sexual abuse that was happening to him in that moment on March 12th, he hit John Doe a few times.” As to the choking of John Doe, defense counsel urged it was a reasonable amount of force to use in self-defense. Thus, the instructions he now claims should have been given were inconsistent with his theory of the case.

Even if the instructions were not inconsistent with defendant’s theory at trial, no substantial evidence supported a defense of unconsciousness due to involuntary intoxication. Defendant testified about both incidents.

As to the March 2 incident, defendant testified “I don’t believe I was drugged . . . that time.”

As to the March 12 incident, defendant told police Doe had drugged him and he was “incapacitated for [the] entire day.” Defendant responded with “rage,” grabbing Doe and throwing him on his bed.” At trial, defendant testified “I remember coming to and

him doing this again. I remember the second time coming out of it, and I remember him on my back. I would assume it was his penis because he was naked at that time I looked up at him, and I don't have an accurate depiction of what happened after that, but what I do know is—I have flash images I remember hitting him. I don't know how many times, but I do know it was enough to knock him . . . away. [¶] . . . I remember him hitting his head. I remember being scared. [¶] . . . [¶] I was scared about what would happen in the future, so I tried to justify it in these actions.” “I basically was telling [him]—you know, you're lucky that, you know, I don't kill you, stuff like th[at].” Accordingly, both defendant's statements and testimony demonstrate he was not unconscious during the March 12 incident.

Moreover, there was no evidence Doe had drugged defendant, only defendant's testimony that he believed he had been drugged in addition to his own voluntary intoxication.

Given the record, the trial court had no duty to give the instructions defendant now claims should have been given.

Evidence of Defendant's Prior Attacks on Doe

Defendant also maintains the trial court erred in admitting evidence of uncharged misconduct under Evidence Code section 1109, because, according to defendant, that statute is “facially unconstitutional,” as is the correlating jury instruction. And even if the statute is valid, he additionally claims the evidence should have been excluded under Evidence Code section 352.

Evidence Code section 1109 provides in part: “[I]n a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, § 1109, subd. (a)(2).) Evidence Code section 1101 provides in part that, except as provided in section 1109, evidence of a person's specific acts of misconduct are inadmissible when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Prior acts of misconduct are admissible,

however, to prove “some fact . . . (such as motive, opportunity, intent, preparation, plan knowledge, identity, absence of mistake or accident . . .).” (Evid. Code, § 1101, subd. (b).)

Defendant concedes that “appellate courts have rejected due process challenges to [Evidence Code] section 1109 using the reasoning of [*People v.*] *Falsetta* [(1999) 21 Cal.4th 903],” in which the Supreme Court upheld the validity of Evidence Code section 1108, allowing evidence of prior, uncharged sexual offenses, and the reasoning of *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016, in which the high court upheld the Evidence Code section 1108 correlating CALJIC jury instruction. (E.g., *People v. Johnson* (2008) 164 Cal.App.4th 731, 738–740 (*Johnson*).) While defendant maintains “[f]or the purposes of preserving this claim for federal court review, . . . that *Falsetta* and *Reliford* are wrongly decided,” we are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Even accepting the validity of *Falsetta*, defendant asserts its reasoning is not controlling, in any event, given that that case dealt with Evidence Code section 1108, not section 1109. This argument has long been rejected by the appellate courts. “Although the Supreme Court has not addressed the constitutionality of [Evidence Code] section 1109 . . . post-*Falsetta* cases from the Courts of Appeal have subsequently upheld the constitutionality of section 1109 against similar due process challenges.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.) As noted in *People v. Price* (2004) 120 Cal.App.4th 224, 240, “we have already considered and rejected the federal and state constitutional facial due process challenges that [defendant] raises regarding the admission of propensity evidence pursuant to Evidence Code section 1109. We need not reiterate its reasoning here but merely endorse its continuing viability.”¹

¹ Moreover, regardless of the constitutionality of Evidence Code section 1109, prior threats and acts of violence against a victim are admissible under Evidence Code section 1101, subdivision (b), to establish motive in a prosecution involving violence or the threat of violence against the same victim. “[W]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered to prove disputed issues such as identity, intent, and motive

Finally, even assuming the validity of Evidence Code section 1109, defendant maintains admission of evidence of his two prior attacks on Doe violated Evidence Code section 352 because “it created a substantial danger that the jury would be distracted from the main inquiries by conclusions about [defendant’s] character.” Under Evidence Code section 352, “the court has discretion to exclude relevant evidence ‘if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’” “The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, ‘prejudicial’ is not synonymous with ‘damaging.’” Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s).” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) “‘We review a challenge to a trial court’s choice to admit or exclude evidence under [Evidence Code] section 352 for abuse of discretion.’” (*People v. Christensen* (2014) 229 Cal.App.4th 781, 800.)

In this case, the prior acts of violence were less inflammatory than the charged conduct. The prior attacks were less violent, resulted in fewer serious injuries, did not result in Doe’s hospitalization and triggered no police involvement. There was little possibility the jury would confuse the fairly recent but distinct prior acts with the charged

are admissible based solely upon the consideration of identical perpetrator and victim.” (*People v. Fruits* (2016) 247 Cal.App.4th 188, 204.) “[T]he reasoning underlying the rule that evidence of prior threats, violence, discord, or conflict between the defendant and victim is admissible to establish motive is no less probative in an elder abuse prosecution charging an act of violence or threat of violence.” (*Ibid.*)

acts. And, as already discussed, evidence of the prior acts of violence was highly probative. The trial court acted well within its discretion in allowing the evidence.

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Humes, P.J.

Margulies, J.